

**2024 01G 0937
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

BETWEEN:

**NEIL BOSE, THE PRESIDENT AND VICE CHANCELLOR
PRO TEMPORE OF MEMORIAL UNIVERSITY OF
NEWFOUNDLAND**

APPLICANT

AND:

**MICHAEL HARVEY, in his capacity as THE
INFORMATION AND PRIVACY COMMISSIONER OF
NEWFOUNDLAND AND LABRADOR**

INTERVENOR

AND:

**MATTHEW BARTER, THE ACCESS TO INFORMATION
REQUESTOR AND COMPLAINANT BEFORE THE
COMMISSIONER**

SECOND INTERVENOR

AND:

GENESIS GROUP INC.

THIRD INTERVENOR

AND:

C-CORE

FOURTH INTERVENOR

A CASE MANAGED PROCEEDING BEFORE THE HONOURABLE JUSTICE STACK

BRIEF OF FOURTH INTERVENOR

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2024 01G 0937
Date of Filing of Document:	October 11, 2024
Name of Filing Party or Person:	Fourth Intervenor
Application to which Document being filed relates:	Originating Application for a declaration pursuant to s.50(2) of the <i>Access to Information and Protection of Privacy Act</i> , 2015 SNL, 2015, c A-1.2
Statement of purpose in filing:	Filed in support of the above noted Originating Application

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PART I: INTRODUCTION

1. This Brief is submitted by the C-CORE as Fourth Intervenor in general support and expansion of the position submitted by Memorial University of Newfoundland (“**Memorial**”) in taking this Application.

PART II: PROCEDURAL HISTORY

2. The Application of Memorial arises from a request for information originally anonymously, but now known to be by Matthew Barter, the Second Intervenor (“**Mr. Barter**”), pursuant to the *Access to Information and Privacy Protection Act*, SNL 2015 c A-1.2.
3. Mr. Barter submitted four access to information requests to Memorial seeking information related to separately incorporated entities (“**SIEs**”) for which Memorial has a relationship. With respect to the Fourth Intervenor, C-CORE, this information included the following:
 - (a) Bonuses/special payments paid to C-CORE executives and bonuses paid to C-CORE management employees from January 1, 2019 to October 23, 2023.
4. Memorial denied Mr. Barter’s request, on the basis that Memorial did not have custody or control over the records in question.
5. Mr. Barter appealed this response to the Information and Privacy Commissioner (the “**Commissioner**”), who in Report A-2024-006 (the “**Report**”) dated February 8, 2024 rejected Memorial’s denial and found on the balance of probabilities Memorial has custody or control of the records in question. The Commissioner recommended that:
 - (a) Memorial conduct a reasonable search for the records described in the four access to information requests that are addressed in the Commissioner’s Report;

- (b) if necessary, request any responsive records from C-CORE, Genesis Group Inc., and the Canadian Centre for Fisheries Innovation; and
- (c) Memorial provide its final response to these requests to the Complainant within 30 business days of receipt of the Report.

*Memorial University of Newfoundland, Re, Report A-2024-006,
2024 CanLII 16508 (NL IPC) [Tab 8 of Brief of Memorial]*

6. Additionally, and of particular concern to C-CORE, the Report contains the following assertion:

[23] From our investigation and based upon the balance of probabilities, C-Core, Genesis and CCFI are part of Memorial and subject to ATIPPA, 2015. There is significant evidence to support this claim.
7. Memorial, filed this Originating Application seeking a declaration pursuant to s.50(2)(a) in response to the Report.
8. The core issue to be determined on the Application is whether Memorial has custody and control over the records sought by Barter and whether the statutory obligations created by the *ATIPPA* which apply to public bodies, extend to SIEs and specifically, C-CORE.
9. C-CORE agrees with and adopts the detailed submissions of Memorial as set forth in its Brief filed in this action.
10. Affidavits were filed by Kelly Martin (for Memorial) and Karla Connolly (for the Third Intervenor, Genesis Group Inc. (“Genesis”)) on August 30, 2024 and C-CORE filed the Affidavit of Paul Griffin on September 6, 2024.
11. Memorial filed its brief with respect to its Application on September 13, 2024.
12. This is a Case Managed matter and it is anticipated that further briefs will be filed by Genesis, the Commissioner, and Mr. Barter prior to trial of this matter, which has been set to commence on January 16, 2025.

PART III ISSUES

13. The issues to be determined on this appeal by Memorial are as follows:
- (a) Are the SIEs public bodies pursuant to ATIPPA?
 - (b) Is the Requested Information within Memorial's custody and control?
 - (c) Does the Requested Information relate to a university matter?
 - (d) Could Memorial reasonably expect to obtain a copy of the Requested Information upon request?
 - (e) Did Memorial breach its duty to assist?
14. C-CORE's position as Fourth Intervenor in this matter relates to a determination of issues in paragraph 13(a) and 13(b) and the following is submitted to assist this Honourable Court in such determination.

PART IV: MEMORIAL AND C-CORE

15. Memorial is considered a "public body" to which the *ATIPPA* applies by virtue of s.2(x)(iii) and s.2(x)(vi).

Access to Information and Privacy Protection Act, SNL 2015, c A-1.2, s.2(x)
[Tab 1]

16. C-CORE is a not-for-profit corporation incorporated under the *Canada Not-For-Profit Corporations Act, SC 2009, c. 23* (the "***Not-For-Profit Corporations Act***"). Under the *Not-For-Profit Corporations Act*, corporations have members as opposed to shareholders. the President of Memorial is the sole member of C-CORE.

Canada Not-For-Profit Corporations Act, SC 2009, c. 23
[Tab 2]

Affidavit of Paul Griffin at paragraph 5

17. C-CORE's relationship with Memorial is defined by the *Not-For-Profit Corporations Act*, the Bylaws of C-CORE (the "**By-Laws**"), and an Agreement dated 18 October 2007 between Memorial and C-CORE (the "**Agreement**").

Affidavit of Paul Griffin at Exhibit [C]

Certificate of Good Standing - Exhibit [A] of Affidavit of Paul Griffin

18. C-CORE operates as a separate corporation in accordance with the *Not-For-Profit Corporations Act*. This includes maintaining a Board of Directors, general corporate governance and corporate operations.

Affidavit of Paul Griffin at paragraph 5

PART V: LAW AND ARGUMENT

19. C-CORE agrees with and adopts the submissions by Memorial in its brief and submits the following additional information regarding the relationship between C-CORE and Memorial as well as C-CORE's unique statutory obligations under its applicable legislation to assist this Honourable Court in making the appropriate determination with respect to the above noted issues.
20. In reviewing the Report, C-CORE has identified a number of factual and legal assertions that it submits are incorrect or inaccurate, at least as far as they apply to C-CORE. These assertions relate to the two issues to be covered by this Brief:
 - (a) Are the SIEs public bodies pursuant to ATIPPA?
 - (b) Is the Requested Information within Memorial's custody and control?

Issue #1: *The SIEs are not public bodies under the ATIPPA*

C-CORE IS NOT A PUBLIC BODY

21. C-CORE states emphatically that contrary to the conclusion in Paragraph [23] of the Report, it is neither legally “part of Memorial” nor “subject to ATIPPA, 2015”.
22. At Paragraphs [15], [19] and [20] of the Decision, the Commissioner makes references to SIE making use of or being provided resources by Memorial, with the subsequent conclusion that this is determinative of their qualification as “part of Memorial and subject to ATIPPA, 2015” in Paragraph [23]. With respect to C-CORE, these statements in the Report are factually incomplete and/or inaccurate. Further, C-CORE submits that they are legally irrelevant to a test of a “public body” under ATIPPA.

*Memorial University of Newfoundland, Re, Report A-2024-006,
2024 CanLII 16508 (NL IPC) [Tab 8 of Brief of Memorial]*

23. Paragraph [15] states of the “SIE”, or the Separately Incorporated Entities of the Applicant, of which C-CORE is one, that “All five SIEs operate on Memorial’s campuses and the university owns the buildings in which they operate.”
24. With respect to C-CORE, this statement is an over-simplification. The buildings C-CORE occupies on Memorial Campus were constructed using C-CORE funding, provided to Memorial by C-CORE and are leased back for nominal rent as a result. For example, the Dr. Jack Clark Geotechnical Engineering Building was transferred by C-CORE to Memorial for \$1 in 2011 and then leased back, as set out in Note 12[b] of the 2024 Financial Statements of C-CORE attached as Exhibit “D” to the Affidavit of Paul Griffin. In other words, it would be Memorial not C-CORE which benefitted from the presence of C-CORE on campus.

Affidavit of Paul Griffin Exhibit [D]

25. Paragraph [16] of the Decision states that “Memorial’s Board of Regents appoints the boards of directors for C-Core, Genesis, and CCFI.” This is neither factually accurate nor past practice.

Memorial University of Newfoundland, Re, Report A-2024-006, 2024 CanLII 16508 (NL IPC) [Tab 8 of Brief of Memorial]

26. C-CORE annually presents a report as required by section 172 of the *Not-for-Profit Corporations Act* to the President of Memorial (the “President”), as the sole member of the corporation, including audited financial statements and recommendations as to individuals to be appointed or re-appointed to the Board of Directors of C-CORE. The resolutions in support of these appointments are executed by the President. This process is in accordance with Article 6 of C-CORE By-Law No. 1 and the Agreement.

Affidavit of Paul Griffin paragraph 7 and Exhibits [B] and [C]

27. The Agreement specifies at paragraph 2.14 only that C-CORE not amend its By-laws on processes for the appointment of directors without advising the President of the University. As a result, C-CORE has historically never reported to nor sought instruction from the Board of Regents on issues relating to the appointment of directors to the Board. Further, direction from the Board of Regents to attempt to instruct C-CORE on general Board appointments would be contrary to the By-Laws and the Agreement.

Affidavit of Paul Griffin paragraph 12 & 13

28. Paragraph [16] continues by stating that the Bylaws of Memorial provide that the Board of Regents is responsible for setting “the long term vision, mission and strategic direction of the University”, and on the basis that the Bylaws of Memorial define the “University” as including the SIE, concludes that “The bylaws clearly incorporate the SIEs into Memorial’s overall plans and makes no distinction between them and its responsibility for the rest of the university.” While this may be an accurate description of the Bylaws of Memorial, these provisions of the Board of Regent’s authority is not recognized by C-CORE’s Bylaws or the Agreement, nor has C-CORE ever received such attempted

instruction from the Board of Regents. Instead, C-CORE through its Board of Directors sets its own Strategic Plan, such Plan and progress along same being reported to the President as member. Further Articles 2 and 3 of the Agreement make it clear C-CORE is responsible for its own management and strategic planning, with no deferral to planning authority of the Board of Regents. Article 4 of the Agreement provides that C-CORE has to provide notice of the adoption of any significant change in any policy, and clearly sets out that this is not an approval process but an information sharing process. Further, Article 4.2 requires only that C-CORE's "administrative, travel and financial policies shall comply with all federal, provincial, municipal and other laws". Articles 4.3 to 4.5 provide C-Core only have to provide copies of its policies. There is nothing in the Agreement requiring C-CORE to comply with the directives or direction as set by the Board of Regents.

Article 4: Administration and Finance

4.1 The University agrees tht it shall provide those necessary administrative and financial services to C-CORE as are agreed upon from time to time between the University and C-CORE.

4.2 C-CORE agrees that its administrative, travel, and financial policies shall comply with all federal, provincial, municipal or other laws.

4.3 In addition, C-CORE agrees that it will provide the Separately Incorporated Entity Standing Committee with a copy of its policy manual, as updated from time to time.

4.4 C-CORE further agrees that each time C-CORE adopts a significant new policy or creates significant changes to an existing policy, it will provide notice thereof, or an updated policy manual, to the Separately Incorporated Entity Standing Committee.

4.5 The University agrees that if the University has any concerns in respect of any of the policies of C-CORE, it shall raise those concerns with C-CORE through the Separately Incorporated Entity Standing Committee.

*Memorial University of Newfoundland, Re, Report A-2024-006,
2024 CanLII 16508 (NL IPC) [Tab 8 of Brief of Memorial]*

Affidavit of Paul Griffin paragraph 12 & 13 and Exhibit [C]

29. The effect of the Agreement and the Bylaws, therefore, is to set C-CORE up with independent management and policy-making authority for its operations, entirely distinct from and unrelated to the management and policy decisions of Memorial. The conclusion reached by the Decision in Paragraph [16] is based entirely upon erroneous assumptions.
30. Paragraphs [19] and [20] of the Report assert that “public bodies” under *ATIPPA* were and are intended to include entities funded with public money. In Paragraph [19], the Decision states to the definition of “public body” as being “broad so as to encompass essentially all organizations that are primarily funded by the public purse.” In Paragraph [20] the Decision categorizes “public bodies” as being either entities “funded exclusively or largely from public revenue” or entities “funded by public money”.

Memorial University of Newfoundland, Re, Report A-2024-006, 2024 CanLII 16508 (NL IPC) [Tab 8 of Brief of Memorial]

31. These statements are both factually and legally accurate, at least as far as they apply to C-CORE.
32. C-CORE does not receive annual or supporting operations funding from either Memorial or the Provincial Government. Instead, C-CORE’s operations are funded entirely from project revenue from C-CORE research projects; for reference see the 2024 Financial Statements of C-CORE attached as Exhibit “D” to the Affidavit of Paul Griffin. Part of this research funding does come from federal and provincial research grants, for which C-CORE competes or participates similarly with private sector companies.

Affidavit of Paul Griffin at paragraph 9 and Exhibit [D]

33. Memorial’s only contributions to the operations of C-CORE are recognized on the financial statement of C-CORE as being in kind administrative services provided, as set out under the Agreement. These include payroll services, security, custodial services, utilities and snow clearing, all of which described in Article 4 of the Agreement. The total value of

these services has been estimated in the 2024 financial statements as being \$440,779 annually.

Affidavit of Paul Griffin Exhibit [D] Page 2 of the Notes Section

34. Even if one accepts the Commissioner's premise in [19] and [20] that the application of ATIPPA is based on the need to follow the expenditure of "public funds", the fact that the only contribution of Memorial to C-CORE is services provided in kind means transparency for any "public funds" expended by Memorial is satisfied by Memorial being subject to ATIPPA, including all aspects of Memorial's provision of these services. On this argument, there is therefore no reason to require ATIPPA to apply to C-CORE to trace Memorial's support for C-CORE.
35. Legally, the assertions in Paragraphs [19] and [20] are misstatements of the criteria for the determination of a "public body" under ATIPPA. It is simply not a test under the definition as to whether a separate legal entity which is a public body (Memorial) has significant "financial, structural, and policy control" is also a public body. The actual definition of a "public body" under ATIPPA section 2(x) is as follows:

(x) "public body" means

(i) a department created under the Executive Council Act ,
or a branch of the executive government of the province,

(ii) a corporation, the ownership of which, or a majority of
the shares of which is vested in the Crown,

(iii) a corporation, commission or body, the majority of the
members of which, or the majority of members of the board of directors
of which are appointed by an Act, the Lieutenant-Governor in Council
or a minister,

(iv) a local public body,

(v) the House of Assembly and statutory offices, as defined
in the House of Assembly Accountability, Integrity and Administration
Act, and

(vi) a corporation or other entity owned by or created by or

for a local government body or group of local government bodies, which has as its primary purpose the management of a local government asset or the discharge of a local government responsibility,

and includes a body designated for this purpose in the regulations made under section 116 , but does not include

(vii) the constituency office of a member of the House of Assembly wherever located,

(viii) the Court of Appeal, the Trial Division, or the Provincial Court , or

(ix) a body listed in Schedule B;

Access to Information and Privacy Protection Act, SNL 2015, c A-1.2, s.2(x)
[Tab 1]

36. C-CORE meets none of the tests established above for qualification as a “public body”. In particular, in respect of (ii) and (iii), its shares are not vested with the Crown, and none of its Board of Directors is appointed by the Lieutenant Governor in Council. Even if Memorial enjoyed the level of “financial, structural, and policy control” asserted by the Decision (which this Brief will detail it does not), it would not mean C-CORE was a “public body” under ATIPPA. By implying that “financial, structural, and policy control” by Memorial is a relevant factor, the Commissioner appears to be trying to re-write or expand the statutory definition of “public body”.

37. The Report at Paragraph [21] continues to state the creation of an SIE not being subject to ATIPPA “offends the purposes of ATIPPA, 2015”. Respectfully, it is not in the authority of the Commissioner to apparently determine what *should* be the test for a “public body” under ATIPPA.

Memorial University of Newfoundland, Re, Report A-2024-006,
2024 CanLII 16508 (NL IPC) [Tab 8 of Brief of Memorial]

38. Further, this purported policy-based expansion of the definition of “public body” by the Commissioner is arguably contrary to the implicit intention of the legislature. C-CORE

submits that this intention can reasonably be interpreted as an intention to exclude the SIE including C-CORE from the operation of ATIPPA. C-CORE has existed since 1975; all of the SIE were in existence at the time of the drafting of the most recent version of ATIPPA. Neither ATIPPA, nor any preceding version of the legislation, nor the *Freedom of Information Act* which preceded it, included C-CORE or any other SIE in its definitions of entities to be governed by the relevant legislation or designated as a “public body”. It is submitted that if there is to be an analysis of the purposes of ATIPPA, the most obvious inference of the intention of the Legislature is that the Legislature has no intention to have C-CORE or the other SIEs governed by ATIPPA.

Freedom of Information Act, 1990 R.S.N. 1990, c. F-25 [Repealed]
[Tab 3]

39. The policy argument for the inclusion of the SIE in Paragraphs [19], [20] and [21] is, it is submitted, actually an expansion of ATIPPA contrary to such legislative intention as can be reasonably inferred, and as such does not support the Commissioner’s arguments.
40. Finally, in Paragraph [21], the Decision holds that the ability of Memorial to create an SIE that may not be subject to ATIPPA “offends the purpose” of the legislation. Again, it is submitted that the Legislature’s intentions as to the purpose of ATIPPA in relation to the SIE can be inferred from the legislative history.
41. The Decision proceeds to justify this allegation by elaborating on the hypothetical level of control by stating “if the Board of Regents wanted this new entity to change focus, it would have the ability to appoint a board to this new entity that would enact the desired changes of the Board of Regents.” This statement, which borders on being facetious, is a significant misrepresentation of the legal and operational authorities relating to the Board of Directors of C-CORE.
42. First, this allegation is directly contrary to the *Not-For-Profit Corporations Act* and the Bylaws of C-CORE. Pursuant to the *Not-For-Profit Corporations Act*, as set out above, the President as Member not the Board of Regents who makes appointments to C-CORE’s

Board.

Affidavit of Paul Griffin at Exhibit [B]

43. In addition, the Bylaws specify restrictions on a) who can serve on the Board (Bylaw 5.03) and b) the process for election of Directors (Bylaw 5.05), which is by the Member on recommendation of C-CORE's Board. Neither support the assertion in the Decision that the Board of Regents could simply dismiss and reappoint C-CORE's Board.

Affidavit of Paul Griffin at Exhibit [B]

44. Further, this statement ignores the legal duties of directors pursuant to general corporate law. Upon appointment to the Board of C-CORE, Directors are subject to the codes of conduct for Directors as set out under the *Not-for-Profit Corporations Act*, and C-CORE's Bylaws. Under section 148 of the *Not-for-Profit Corporations Act*, the Directors are subject to statutory duties as follows:

148 (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

These requirements are repeated and reiterated as obligations of Directors in Bylaw 9.01.

Canada Not-For-Profit Corporations Act, SC 2009, c. 23, s. 148

[Tab 2]

Affidavit of Paul Griffin at Exhibit [B]

45. The statement in Paragraph [21] is therefore erroneous at both fact and law, and can provide no justification for the argument presented in Paragraph [21] that the creation of an SIE "offends" ATIPPA.
46. Finally, Paragraph [21] of the Report characterizes C-CORE as an entity over which the

Applicant “retains significant financial, structural, and policy control”. As set out above, the Applicant does not as a matter of either fact or practice retain or exercise significant “financial, structural, and policy control” over C-CORE.

Memorial University of Newfoundland, Re, Report A-2024-006, 2024 CanLII 16508 (NL IPC) [Tab 8 of Brief of Memorial]

47. After stringing together a line of assumptions and legal reasoning that have both been shown above to be entirely without merit, the Commissioner at Paragraph [23] found “From our investigation and based upon the balance of probabilities, C-Core, Genesis, and CCFI are part of Memorial and subject to *ATIPPA*, 2015.”
48. It is not entirely clear in this context what the Commissioner means by finding that C-CORE is a “part of Memorial”. As a separate and distinct legal entity, there is no provision under *ATIPPA* for C-CORE simply being amalgamated into Memorial for the purpose of the determination of whether it is a “public body”.
49. As set out above, C-CORE does not qualify as a “public body” under the definition under *ATIPPA*. The Decision attempted to justify an expansion of this definition using arguments which have been shown above to be based upon a combination of errors of fact and law which do not support the position, even if it were up to the Commissioner to expand the definition of “public body”.
50. C-CORE suddenly being subject to *ATIPPA* would have significant implications for C-CORE. As noted in the Affidavit of Paul Griffin, C-CORE operates in a context where it competes and participates in research grants with private sector entities. C-CORE being subject to *ATIPPA* would mean all of these arrangements and activities would be subject to disclosure requirements. This would include all confidential information obtained and supplied by third parties, which would be directly contrary to the long-established practices of C-CORE and the reasonable expectation of its private sector partners and customers.

51. The finding of the Commissioner at Paragraph [23] therefore have been shown to be without factual foundation or legal merit, and to have serious and material expected detrimental impacts on the operation of C-CORE. As such it is submitted it should be expressly overturned.

Memorial University of Newfoundland, Re, Report A-2024-006, 2024 CanLII 16508 (NL IPC) [Tab 8 of Brief of Memorial]

Issue #2: *Requested Information is not within Memorial's Custody and Control*

52. C-CORE agrees that the two-pronged test outlined by the Supreme Court of Canada in *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 ("*National Defence*") as cited by Memorial in its brief at paragraph 88-89 is the correct test to determine whether the requested information was in the "custody or control" of Memorial.
53. The two-pronged test in *National Defence* is stated at paragraph 50 and discussed further at paragraph 55:

50 The Federal Court of Appeal agreed with this test, holding that, in the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request? (Decision 1, at paras. 8-9).

55 Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The Commissioner agrees that the *Access to Information Act* is not intended to capture non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.

Canada (Information Commissioner) v Canada (Minister of National Defence),

54. C-CORE notes that at paragraph [28] of the Report, the Commissioner concludes “With respect to question one of the control test, the information being sought by the Complainant certainly relates to a matter of importance to Memorial.”

Memorial University of Newfoundland, Re, Report A-2024-006, 2024 CanLII 16508 (NL IPC) [Tab 8 of Brief of Memorial]

55. C-CORE challenges the Commissioner’s paraphrasing of the threshold step outlined in *National Defence* and states that this does not answer the actual question of whether the subject records relate to a departmental matter of Memorial. C-CORE states that this paraphrase amounts to a subjective assessment by the Commissioner and does not address step one of the control tests as stated in *National Defence*.
56. C-CORE agrees with the position advanced by Memorial in its brief that the specific records requested by the Complainant do not relate to a departmental matter of Memorial. C-CORE states that, as a result, the Commissioner’s inquiry into whether Memorial has “control” of the records should have terminated at this point; the analysis simply should not have continued to step two of the test. C-CORE supports the position of Memorial that the decision not to search for the SIE’s records did not constitute a breach of its duty to assist, as it would be a search for information not in its custody or control.
57. The Commissioner appears to have concluded that the subject records were a departmental matter of Memorial on the basis that the information relates to Memorial’s financial reporting and audit responsibilities as a “statutory obligation”. This latter reference is apparently a reference to paragraph [27] which refers to section 38 of the *Memorial University Act*, repeated at paragraph [8] of the Decision and here for reference:

38. (1) The accounts of the board shall be audited at least once a year by the auditor general, or by some person appointed by the Lieutenant-

Governor in Council.

(2) Where an auditor other than the auditor general audits the accounts of the board, the auditor shall comply with subsection 19(3) of the Auditor General Act, 2021.

Memorial University Act, RSN 1990, c. M-7, s. 38
[Tab 4]

58. At paragraphs [27] and [28] the Commissioner appears to be confused about what these sections require. C-CORE's position is that they require Memorial to have its financial statements (referred to as the accounts of the board, meaning the Board of Regents) audited annually. It does not mean Memorial actually itself performs the audit; instead, the audit is by definition completed by an outside third party to Memorial.
59. Memorial has, for some time, presented its financial statements as consolidated financial statements, incorporating the financial statements of its SIE into its reporting. The Commissioner appears at Paragraphs [28] and [29] to believe that this process and/or the audit process creates additional requirements and rights in Memorial to have access to transactional level information of the SIE. At Paragraph [28], the Decision states in reference to audit of Memorial's consolidated financial statements and the audit of them:

"The information requested by the Complainant directly impacts the result of the audit that Memorial is obligated to perform. What is being sought are expenditures made by three of Memorial's SIE and these expenditures would have to be disclosed to Memorial in order for its audit to be accurate."

Memorial University of Newfoundland, Re, Report A-2024-006,
2024 CanLII 16508 (NL IPC) [Tab 8 of Brief of Memorial]

60. It is submitted that this is a fundamental misunderstanding of the legal implications of the consolidation of financials statements, and that the Commissioner's assumptions are not reflective of any aspect of the legal structure or practice between C-CORE and Memorial.
61. Memorial is not required to present consolidated financial statements under the *Memorial University Act*, nor does the Act provide any basis for the expansion of

Memorial's legal authorities upon adopting consolidated statements. In fact, the concept of consolidated financial statements is not raised in the *Memorial University Act*, ATIPPA, or the Agreement.

62. The *Not-for-Profit Corporations Act*, the legislation which governs both C-CORE and the legal relationship with the President of Memorial as member, does have provisions dealing with consolidated financial statements. It is submitted these provisions do not support the Commissioner's position.

63. Subsection 174(1) requires that where a corporation has consolidated financial statements, it is only required to keep copies of the financial statements of its subsidiary entities:

174 (1) A corporation shall keep at its registered office a copy of the financial statements of each of its subsidiaries and of each body corporate the accounts of which are consolidated in the financial statements of the corporation.

Canada Not-For-Profit Corporations Act, SC 2009, c. 23, s. 174
[Tab 2]

64. Sections 191, 192 and 193 of the *Not-for-Profit Corporations Act* deal with the disclosure of information to the accountant for the corporation (referred to as a "public accountant"). Section 191 requires the public accountant to report to members having completed an audit of the corporation. Section 193 provides the public accountant the authority to require the disclosure of information from all relevant parties as necessary to prepare the reports required in section 191. However, section 192(1) is an exception to this disclosure requirement relating to subsidiaries and consolidated financial statements. It provides that the public accountant for a holding corporation (defined in the *Not-for-Profit Corporations Act* to be the holder of a subsidiary corporation) may reasonably rely upon the reports to the public accountant of a subsidiary:

191 After conducting an audit engagement or a review engagement, the public accountant shall report in the prescribed manner on the financial

statements required by this Act to be placed before the members, except any financial statements or part of those statements that relate to the period referred to in subparagraph 172(1)(a)(ii).

192 (1) Despite section 193, a public accountant of a holding corporation may reasonably rely on the report of a public accountant of a body corporate or an unincorporated business the accounts of which are included in whole or in part in the financial statements of the corporation.

(2) For the purpose of subsection (1), reasonableness is a question of fact.

(3) Subsection (1) applies whether or not the financial statements of the holding corporation reported on by the public accountant are in consolidated form.

193 (1) At the request of a public accountant of a corporation, the present or former directors, officers, employees, agents or mandataries of the corporation shall furnish the following, if they are reasonably able to do so and if, in the opinion of the public accountant, it is necessary to enable the public accountant to conduct the review or audit engagement required under section 188 or 189 and to make the report required under section 191:

(a) any information and explanations; and

(b) access to records, documents, books, accounts and vouchers of the corporation or any of its subsidiaries.

Canada Not-For-Profit Corporations Act, SC 2009, c. 23, s. 191-193
[Tab 2]

65. The implications of sections 174 and sections 191 to 193 is that the consolidation of financial statements, where and to the extent it occurs, occurs at the financial statement or accountant report level. There are no provisions of the *Not-for-Profit Corporations Act* which expand the rights of access to information on the part of a parent or holding company into the accounts of a subsidiary of a member, or the disclosure obligations of a corporation, solely as a result of the parent or holding company moving to consolidated financial statements. Instead, the disclosure obligations of the corporation continue to be governed by the obligations to submit financial statements such as section 172.

66. There is therefore no legal basis for the assertion and assumption of the Commissioner at Paragraphs [28] and [29] that the fact Memorial has consolidated financial statements creates additional legal requirements and rights in Memorial to have access to transactional level information of C-CORE. Instead, Memorial's right or entitlement of information of C-CORE continues to be governed by the Act, the Bylaws of C-CORE, and the Agreement, as set out above. This Agreement, for example, does not provide Memorial with any ownership of, or proprietary right to, financial information of C-CORE beyond what is necessary for Memorial to perform its obligations under the Agreement. C-CORE submits that this Agreement does not provide Memorial with ownership of the Requested Information sought by the Complainant. Memorial's requirement to prepare and provide financial statements, or the requirement that they be audited by the Auditor General, does not create a new or greater entitlement to C-CORE's records on the part of Memorial.
67. Therefore, to the extent that Paragraphs [27] and [28] appear to be arguing that (i) as a result of its statutory obligation to produce financial statements for audit, Memorial has to conduct an audit (which it does not), and (ii) to conduct such audit Memorial has to have access to the detailed transaction information of each of its SIE (for which no legal authority has been presented, and for which contrary legal authority exists), both statements and conclusions are incorrect.

*Memorial University of Newfoundland, Re, Report A-2024-006,
2024 CanLII 16508 (NL IPC) [Tab 8 of Brief of Memorial]*

68. With respect to whether the Requested Information relates to a departmental matter of Memorial, C-CORE again adds that its statutory financial disclosure obligations to Memorial are those which are enumerated in section 172 of the *Not-for-Profit Corporations Act*, stated below, which do not include the specific records requested by the Complainant:

172(1) Annual financial statements

The directors of a corporation shall place before the members at every annual meeting

- (a) prescribed comparative financial statements that conform to any prescribed requirements and relate separately to
 - (i) the period that began on the date the corporation came into existence and ended not more than six months before the annual meeting or, if the corporation has completed a financial year, the period that began immediately after the end of the last completed financial year and ended not more than six months before the annual meeting; and
 - (ii) the immediately preceding financial year;
- (b) the report of the public accountant, if any; and
- (c) any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous member agreement.

Canada Not-For-Profit Corporations Act, SC 2009, c. 23, s. 172
[Tab 2]

69. Regulations under the NFPCA further clarify what is required to be provided as a part of the “comparative financial statements” to members such as the President of Memorial which support C-CORE’s position.

79(1) For the purpose of paragraph 172(1)(a) of the Act, the prescribed comparative financial statements are the following:

- (a) a statement of financial position or a balance sheet;
- (b) a statement of comprehensive income or a statement of retained earnings;
- (c) a statement of changes in equity or an income statement; and
- (d) a statement of cash flows or a statement of changes in financial position.

79(2) The comparative financial statements need not be designated by the names set out in subsection (1).

70. C-CORE submits that expenditures within the scope of the NFPCA Regulations are reported in annual financial statements on a net basis and that there is no statutory requirement to disclose itemized financial information as is requested by Barter. Therefore, the Commissioner's conclusion that C-CORE is required to disclose the required records to Memorial in order for Memorial's audit to be accurate is incorrect.

Gray's Commentaries on Federal Corporate Laws, Chapter 4, Part 11

[Tab 6]

71. C-CORE states that Memorial's possession of detailed transactional financial information of C-CORE is exclusively a function of C-CORE using Memorial's records management system known as "On-Base", and payroll administration software known as "BannerHR", for its expenditure and payroll purposes. Memorial's provision of On-Base and BannerHR access is detailed in the Affidavit of Kelly Martin and consistent with Memorial's service delivery obligations under the Agreement.

Affidavit of Kelly Martin at paragraphs 11-19

72. To highlight the problem with the Commissioner's arguments, it has to be remembered that C-CORE's use of On-Base and BannerHR and, as a result, Memorial's access to C-CORE's transactional financial information, is entirely a function of the Agreement and Memorial providing accounting and financial services to C-CORE. If C-CORE were to terminate this arrangement and transfer its accounting and financial information to a 3rd party, Memorial would have no possession of, or right of access to, the financial information being requested under the ATIPPA request. In this scenario, Memorial's possession of such records cannot be construed as being a departmental function of Memorial.
73. C-CORE repeats its position that the assessment of custody and control of the records should not have proceeded to part two of the test set forth in *National Defence*. However,

as the Commissioner's Report examined the factors applicable to this stage of the test, C-CORE provides its position accordingly.

74. In assessing part two of the test in *National Defence*, the Commissioner cites a non-exhaustive list of 13 factors contained in Ontario IPC Order MO-275 that have been accepted in other jurisdictions and adopted by the Office of the Information and Privacy Commissioner of Newfoundland and Labrador in *Memorial University (Re)*, 2017 CanLII 53403 (NL IPC). C-CORE does not challenge the applicability of this list of factors but does challenge the Commissioner's interpretation and application of each, as the analysis provided by the Commissioner amounts to a fundamental misunderstanding of financial reporting obligations of federally incorporated not-for-profit corporations and, in turn, Memorial's statutory right to certain records of C-CORE.

Memorial University (Re), 2017 CanLII 53403 (NL IPC)
[Tab 9 of Brief of Memorial]

75. The Commissioner's analysis of these factors informs its determination that Memorial has more than "bare possession" of the requested records. C-CORE specifically challenges this determination on the basis that:

- (a) Any access that Memorial currently has to the records sought by the Complainant is by virtue of the shared accounting program BannerHR;
- (b) Memorial has no ownership or proprietary right to the records sought by virtue of the Agreement between Memorial and C-CORE; and
- (c) Memorial has no statutory right to the records sought.

76. Specifically, with respect to the analysis of the 13 steps set out by the Commissioner in Paragraph [30], C-CORE states as follows:

(a) Was the record created by an officer or employee of the institution?

77. C-CORE agrees with and adopts the position of Memorial as outlined in its brief at

paragraphs 110-114.

78. C-CORE adds that, as the “institution” is Memorial, records created by employees of C-CORE do not satisfy this test. Employees of C-CORE are independent of Memorial and there is no relationship between the employees of C-CORE and Memorial.

(b) What use did the creator intend to make of the record?

79. C-CORE agrees with and adopts the position of Memorial as outlined in its brief at paragraphs 115-117.
80. The Commissioner is correct the record is used for expenditures of C-CORE, but there is no obligation for the inclusion of the record in the financial statements of Memorial *through this process*. The creation of the record and provision of same to Memorial is intended solely for the purpose of Memorial fulfilling its obligations to the extent contemplated by the Agreement.

(c) Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the records?

81. The institution being Memorial, C-CORE states that the answer is no. Memorial provides payment services to C-CORE pursuant to the Agreement not as a statutory duty.

(d) Is the activity in question a “core”, “central” or “basic” function of the institution?

82. C-CORE agrees with and adopts the position of Memorial as outlined in its brief at paragraphs 118-126.
83. C-CORE reiterates that the provision of payment services to C-CORE is not a “core”, “central” or “basic” function of Memorial. This can be seen in that C-CORE could seek the services elsewhere.

(e) Does the content of the record relate to the institution’s mandate and functions?

84. C-CORE agrees with and adopts the position of Memorial as outlined in its brief at paragraphs 127-135.

85. The institution being Memorial, C-CORE states that the answer is no. The content of an expenditure record by C-CORE as a SIE in BannerHR relates presumably to its own activities, not the mandate or functions of Memorial. As noted above, C-CORE sets its own policy objectives, strategic plan, and is independently managed and administered from Memorial.

(f) Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

86. Memorial may have the record by virtue of C-CORE's provision of same solely to enable Memorial to perform its obligations under the Agreement. There is no mandatory or employment requirement and therefore, if Memorial has copies of the information, it has been voluntarily provided by C-CORE pursuant to the Agreement so that Memorial as service provider may facilitate the payments in question.

(g) If the institution does have possession of the record, is it more than "bare possession"? "Bare possession" means: does Memorial have ownership of the record without the right to use it for its benefit?

87. C-CORE agrees with and adopts the position of Memorial as outlined in its brief at paragraphs 136-153.

88. C-CORE states that, if Memorial has possession of the records, it is bare possession and that it has them as service provider through its accounting system, not pursuant to an overriding statutory right for its own benefit. Any possession of the record in BannerHR is not possession by Memorial for Memorial's use or benefit.

89. This is detailed in the Affidavit of Kelly Martin which clearly demonstrates that the contents of the record are not used for any purpose in connection with Memorial, other than to perform its obligations under the Agreement.

(h) If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?

90. Not applicable.

(i) Does the institution have a right to possession of the record?

91. No, there is no statutory right of Memorial to possess C-CORE's financial records. As set out above, Memorial's statutory duty is to prepare financial statements and to have them audited by the Auditor General. Neither requires Memorial to have consolidated statements, nor that Memorial have full access to transitional level information of C-CORE.

(j) Does the institution have the authority to regulate the record's content, use and disposal?

92. C-CORE agrees with and adopts the position of Memorial as outlined in its brief at paragraphs 154-157.

93. C-CORE states that, notwithstanding the consolidation of financial statements, Memorial has not specified in the Agreement any requirement on C-CORE relating to the records' content, use or disposal. Memorial may have prescribed same through its control of the BannerHR system as a function of the system.

(k) Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?

94. C-CORE agrees with and adopts the position of Memorial as outlined in its brief at paragraphs 158-166.

95. With respect to the record as it exists in BannerHR, Memorial's use of same is governed internally by restrictions as detailed in the Affidavit of Kelly Martin as well as externally insofar as it is necessary to carry out its obligations under the Agreement. C-CORE states that Memorial has no authority to place limits on the content of the record as generated internally by C-CORE.

(l) To what extent has the institution relied upon the record?

96. C-CORE agrees with and adopts the position of Memorial as outlined in its brief at paragraphs 167-169.
97. C-CORE states that Memorial's consolidation of financial statements does not require transactional level access or information of C-CORE and there is no other indication, statutory or otherwise, to suggest that Memorial has relied upon the record, other than in its performance of obligations under the Agreement.

(m) How closely is the record integrated with other records held by the institution?

98. C-CORE agrees with and adopts the position of Memorial as outlined in its brief at paragraphs 170-175.
99. C-CORE's financial records in BannerHR need not be integrated with any Memorial records. The Affidavit of Kelly Martin details how the records purposely segregated within Memorial to restrict access. This includes "storage" of SIE information within its records management system On-Base and the administration of payroll through the use of BannerHR. The Affidavit of Kelly Martin makes it clear that use of these records is strictly for the administration of payroll services by Memorial pursuant to the Agreement.

Conclusion

100. Any decision of this Honourable Court in favour of Memorial's ability to obtain or disclose the requested records from C-CORE based on the Commissioner's findings will have significant implications for the operation of C-CORE and would incorrectly characterize the relationship between the Memorial and C-CORE with respect to disclosure obligations created by virtue of the *Not-for-Profit Corporations Act* and *ATIPPA*.
101. C-CORE submits that the Commissioner has incorrectly interpreted legislation applicable to federally incorporated not-for-profit corporations and that its conclusions directly impact C-CORE's financial disclosure obligations to all members, present and future.

PART VI: RELIEF SOUGHT

102. C-CORE therefore seeks from this Honourable Court as follows

- (a) An Order confirming that C-CORE is not “part of Memorial” on the basis put forward by the Commissioner;
- (b) An Order that C-CORE is not “subject to ATIPPA, 2015” on the basis put forward by the Commissioner;
- (c) An Order that C-CORE is not a “public body” pursuant to ATIPPA; and
- (d) An Order that Memorial does not have “custody and control” of the Requested Information.

DATED at the City of St. John’s, in the Province of Newfoundland and Labrador, this 11 day of October, 2024.



G. Todd Stanley, K.C.
COX & PALMER
Solicitor for the Fourth Intervenor
Whose address for service is:
Scotia Centre, Suite 1100
235 Water Street
St. John’s, NL A1C 1B6

TO: Koren A. Thomson
STEWART MCKELVEY
Solicitors for the Applicant
Whose address for service is:
Suite 1100, Cabot Place
100 New Gower Street

P.O. Box 5038
St. John's, NL A1C 5V3

TO: Andrew A. Fitzgerald, K.C.
LEARMONTH, BOULOS & FITZGERALD
Solicitors for the First Intervenor
Whose address for service is:
Suite 804, TD Building
140 Water Street
St. John's, NL A1C 5L7

TO: Matthew Barter
The Second Intervenor
47 Patrick's Path
Torbay, NL A1K 1J8

TO: J. Alexander Templeton & Catherine Hutchens
MCINNES COOPER
Solicitors for the Third Intervenor
Whose address for service is:
5th Floor, Baine Johnston Centre
10 Fort William Place
St. John's, NL A1C 5X4

**TO: THE SUPREME COURT OF NEWFOUNDLAND
AND LABRADOR**
General Division
309 Duckworth Street
P.O. Box 937
St. John's, NL A1C 5M3

ISSUED at the City of St. John's, in the Province of Newfoundland and Labrador, this ____ day
of _____, 2024.

1403-6518-0687, v. 1